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Maine Department of Health and Human Services

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221 State Street
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Augusta, ME 04333

5/10/06
DATE MAILED

ADMINISTRATIVE HEARING RECOMMENDATION

An administrative hearing was held on March 28, 2006 in the case of the Windward Gardens at Rockland, Maine, before, Hearing Officer Miranda Benedict, Esq.. The Hearing Officer's jurisdiction was conferred by special appointment from the Commissioner, Department of Health and Human Services (DHHS).

CASE BACKGROUND AND ISSUE:

Windward Gardens is a nursing facility (NF). DHHS conducted a Case Mix Review of Windward Gardens on July 19, 2005. DHHS reviewed the records of 15 Windward Garden residents and determined that the records of 3 of those residents were in error, and determined that 37% of the records that it reviewed were in error, and determined that Windward Gardens was subject to a 5% sanction.

Windward Gardens disputed the DHHS findings and requested an Informal Review. DHHS conducted an Informal Review and affirmed its original findings. The results of the Informal Review were conveyed to Windward Gardens by letter dated October 13, 2005. By letter dated February 17, 2006 Windward Gardens requested an administrative hearing. This matter was referred to the Office of Administrative Hearings by the Order of Reference dated March 6, 2006. This issue at this hearing was stated in the Order of Reference:

- (1) Was the Department correct when, as a result of a Case Mix Review conducted on July 19, 2005 of Windward Gardens, it determined that there was a 37% error rate and a 5% sanction?

APPEARING ON BEHALF OF WINDWARD GARDENS

Susanne Heeschen

APPEARING ON BEHALF OF AGENCY:

Our vision is Maine people enjoying safe, healthy and productive lives.

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ITEMS INTRODUCED INTO EVIDENCE:

Hearing Officer exhibits:

- HO-1 Scheduling Notice dated March 7, 2006
- HO-2 Order of Reference dated March 6, 2006
- HO-3 Fair Hearing Report Form dated February 17, 2006
- HO-4 Letter from James Bivins to Carl Chadwick acknowledging request for hearing dated February 24, 2006
- HO-5 Letter from Carl Chadwick to John Nicholas requesting formal hearing dated February 17, 2006
- HO-6 Memo from Michael Hall, Deputy Commissioner, to Audrey Savoie dated August 26, 2005
- HO-7 Letter from Carl Chadwick to Michael Hall, Deputy Commissioner requesting informal review dated August 4, 2005

Department exhibits:

- 1-A CC's care plan
- 1-B FB's care plan
- 2 Excerpt, Regulations Governing the Licensing and Functioning of Skilled Nursing Facilities and Nursing Facilities
- 2-A Excerpt, Guidance to Surveyors-Long Term Care Facilities
- 3 Excerpt, Long Term Care Facility Resident Assessment Instrument User's Manual, Center for Medicare and Medicaid Services
- 4 Excerpt, Office of MaineCare Services Case Mix MDS 2.0, DHHS
- 5 MDS Certification Training, Sandy River Health System
- A. Excerpt, Maine Medical Assistance Manual, Chapter 1
- B. Excerpt, Principles of Reimbursement for Nursing Facilities
- C. Excerpt, Chapter II, §67 Nursing Facility Services
- D. Exit Interviews conducted by Ms. Phillips with Windwood Garden personnel

Windward Gardens exhibits:

- Exhibit 1A Letter to Miranda Benedict from Susanne Heeschen dated March 15, 2006
- Exhibit 1 Excerpt, MaineCare Benefits Manual, Chapter II §67
- Exhibit 2 Excerpt, MaineCare Benefits Manual, Chapter III §67
- Exhibit 3 Excerpt, CMS's RAI Manual
- Exhibit 4 Care Plan for FB with supporting documentation
- Exhibit 5 Care Plan for CC with supporting documentation
- Exhibit 6 Excerpt, Nursing Care Planning Guides for Long Term Care, edited by Charlott Eliopoulos, RNC, MPH, Williams & Wilkins
- Exhibit 7 Excerpt, Geriatric Care Plans, Diane Kaschak Newman, Diane A. Jakovac Smith, Springhouse Corp.

FINDINGS OF FACT:

1. Ms. Lillian Phillips performed a case mix audit at Windward Gardens on July 19, 2005.
2. Regarding CC
 - a. Care Plan: Windward identified a problem that CC had with a self care deficit and inability to perform ADLS independently. They identified the goal as to participative every day with bathing dressing, and grooming AEB ability to wash, dry face, hands and upper body with one assist. A further goal is to maintain current level of functioning.
 - b. The Documentation Record for CC indicates that C.N.A's documented that CC was participating with dressing and grooming both on the night and evening shift every day for the time period March 2005 through June 2005. The same was done for Toileting for the day and evening shifts.
 - c. Restorative Program Evaluations dated March 21, 2005 and June 17, 2005: Notes indicated that "According to Staff, resident is doing well with this program (dressing and grooming). She is able to wash, dry and dress, her face, hands, upper body with assistance from staff and constant cuing."
 - d. Both the Quarterly Assessment (June 17, 2005) and Annual Assessment (March 21, 2005) indicate that CC is currently on two restorative programs and refer the reader to the evaluations indicated in c. above.
 - e. MDS dated March 21, 2005 and June 16, 2005 indicate that CC has 7 days a week of Dressing or grooming care under the Nursing Rehabilitation/Restorative Care Program.
 - f. MDS dated March 21, 2005 and June 16, 2005 indicate that CC requires Extensive Assistance with one personal physical assist in Dressing and Personal Hygiene.
3. Regarding F.B.
 - a. Care Plan:
 - i. Windward identified a problem with a mobility impairment related to an old CVA injury, specifically Transfers. They identified the goal which is to maintain current level of functioning by participating in restorative program. The approach plan is to give verbal physical assistance, two cues for hand and feet placement, encourage resident to maximize leg strength.
 - ii. Windward identified a problem with a self care deficit and inability to perform ADLS independently. They identified the goal as to participative every day with bathing dressing, and grooming AEB ability to wash, dry face, hands and upper body with one assist. A further goal is to maintain current level of functioning.
 - b. The Documentation Record for CC indicates that C.N.A's documented that FB was participating with dressing and grooming both on the night and evening shift every day for the time period March 2005 through June 2005. The same was done for Transfer for the day and evening shifts.
 - c. Restorative Program Evaluations dated March 21, 2005 and June 17, 2005 regarding Grooming: "According to Staff, resident is doing well with this program (dressing and grooming). She is able to wash, dry and dress, her face, hands, upper body with assistance from staff and constant cuing."
 - d. Restorative Program Evaluations dated March 21, 2005 and June 17, 2005 regarding Transfers: "According to Staff, resident also does with well with this program. She is able to partial weight bear when on the lift. Goal is to maintain current leg strength, will continue with program."
 - e. Both the Quarterly Assessment (June 17, 2005) and Annual Assessment (March 21, 2005) indicate that CC is currently on two restorative programs and refer the reader to the evaluations indicated in c. and d. above.
 - f. MDS dated March 21 2005 and June 16, 2005 indicate that FB has 7 days a week of Dressing or grooming care under the Nursing Rehabilitation/Restorative Care Program and 7 days a week of Transfer under the same program.
 - g. MDS dated March 21, 2005 and June 16, 2005 indicate that FB requires Extensive Assistance with one person physical assist in Dressing and Personal Hygiene.
 - h. MDS dated March 21, 2005 and June 16, 2005 indicate that FB requires Extensive Assistance with two person physical assist in Transfer.

RECOMMENDED DECISION:

The hearing officer recommends that the Commissioner **REVERSE** the DHHS action and find that the Department was not correct when, as a result of a Case Mix Review conducted on July 19, 2005 of Windward Gardens it determined that there was a 37% error rate and a 5% sanction.

REASONS FOR RECOMMENDATION:

The Principles of Reimbursement for Nursing Facilities (Chapter III, Section 67, of the MaineCare Benefits Manual) are the MaineCare rules governing reimbursement to NFs for MaineCare-eligible residents. Under these rules, NFs are reimbursed for MaineCare-eligible residents on the basis of a number of different variables including a “direct care cost component.” Reimbursement to NFs for the direct care cost component is based on a “resident classification system” that classifies each resident into one of 45 case mix classification groups (Section 41, first unnumbered paragraph, and Section 41.2).

NFs are required to assess all their residents through the use of the “Resident Assessment Instrument,” or “RAI,” which is comprised of the “Minimum Data Set,” or “MDS,” and the “Resident Assessment Protocols,” or “RAPs.” Under the MDS, residents are classified into one of the 45 case mix classification groups (Section 41.2).

DHHS conducts “MDS assessment reviews” to ensure that NF assessments accurately reflect residents’ clinical conditions (Section 41.23.1[2]). At an MDS assessment review, DHHS reviews a sample of the NF’s MDS assessments for residents for whom the MaineCare Program is reimbursing the NF.

As a result of its MDS assessment review, DHHS determines the NF’s “assessment review error rate,” which is the percentage of “Unverified Case Mix Group Records” in the sample of cases it reviewed (Section 41.23.1[4]).

The “Unverified Case Mix Group Record” is a resident’s record that DHHS has determined does not accurately represent the resident’s condition, and therefore results in the resident’s inaccurate classification into a case mix group that increases the case mix weight assigned to the resident (Section 41.23.1[6]). Section 41.23.1(6) reads in part:

(6) “Unverified Case Mix Group Record” is one which, for reimbursement purposes, the Department has determined does not accurately represent the resident’s condition, and therefore results in the resident’s inaccurate classification into a case mix group that increases the case mix weight assigned to the resident.

Depending on the magnitude of the “assessment review error rate,” DHHS must sanction the NF by reducing the NF’s “total direct care cost component,” thus reducing MaineCare reimbursement to the NF. The decreases are 2% if the NF’s error rate is 34% or greater but less than 37%, 5% if the NF’s error rate is 37% or greater but less than 41%, 7% if the NF’s error rate is 41% or greater but less than 45%, and 10% if the NF’s error rate is 45% or greater (Section 41.23.4).

The errors that the Department identified in regards to the charting for C.C. and F.B were in the charting of their Rehabilitation/Restorative Care Program. According to the RAI Training manual, specific documentation must be present in order code for this program on the MDS:

“Definition: Rehabilitation/Restorative Care-Included are nursing interventions that assist or promote the resident’s ability to attain his or her maximum functional potential. This item does not include procedures or techniques carried out by or under the direction of qualified therapists, as identified in Item P1b. In addition to be included in this section a rehabilitation or restorative care must meet all of the following additional criteria:

- *Measurable objectives and interventions must be documented in the care plan and in the clinical record*
- *Evidence of periodic evaluation by licensed nurse must be present in the clinical record*
- *Nurse assistants/aides must be trained in the techniques that promote resident involvement in the activity.*
- *These activities are carried out or supervised by members of the nursing staff. Sometimes, under licensed nurse supervision, other staff and volunteers will be assigned to work with specific residents.*
- *This category does not include groups with more than four residents per supervising helper or caregiver.”*

According to the reviewer’s exit notes and the informal review, the Department found Windward Gardens to be in error based upon their failure to provide measurable goals and interventions regarding the restorative/rehabilitation programs in which C.C. and F.B. participated. According to the informal review, C.C.’s identified problem, self care deficit, had an inadequate goal of ‘maintain current level of functioning.’ According to the Department, “This statement does not describe precisely which or what self-care functions are meant (there are many possibilities) or what those levels currently are. It logically follows that since we do not know specifically what the nursing team intends to maintain (no base from which to measure); there is also no way to measure outcomes. So the very first criterion in the manual lists are not met” In regards to F.B. the Department finds the same error. “The goal in question, under problem “Mobility Impairment” reads ‘goal-maintain current level of functioning by participating in restorative program’. Again, what specific levels of functioning are meant? How would one know what to measure? Or how to measure. No basis has been established to go by?”

According to the facility, the goals were measurable in both CC’s and FB’s documentation, and that the records accurately reflect the residents’ conditions.

The Hearing Officer finds that the audit did not uncover any documentation that did not accurately reflect a resident’s condition and therefore did not result in an inaccurate classification of a resident into a case mix group that they did not belong in. Instead, the Department found that the Facility did not meet a certain professional standard of documentation. The latter may be a valid issue for the Facility to address, however it is not the issue for a case mix audit. The rules, in this instance, do not authorize citations or sanctions for a facility not meeting a ‘professional’ standard of documentation.

The MDS forms for both residents indicate that they have been placed in the correct case mix group. The Department never alleged that the residents had been placed in the incorrect group. In fact, when asked by the Facility, the Department representative admitted that, despite her concerns about the documentation, the documentation in these cases did not result in an classification of either resident into a inaccurate case mix group.

Therefore, the hearing officer recommended that the Commissioner reverse the DHHS action and find that the Department was when, as a result of a Case Mix Review conducted on July 19, 2005 of Windward Gardens, it determined that there was a 37% error rate and a 5% sanction.

DATED May 10, 2006

SIGNED: _____
Miranda Benedict, Esq.
Hearing Officer

THE PARTIES MAY FILE WRITTEN RESPONSES AND EXCEPTIONS TO THE ABOVE RECOMMENDATIONS. ANY WRITTEN RESPONSES AND EXCEPTIONS MUST BE RECEIVED BY THE OFFICE OF ADMINISTRATIVE HEARINGS WITHIN TWENTY (20) CALENDAR DAYS OF THE DATE OF MAILING OF THIS RECOMMENDED DECISION. A REASONABLE EXTENSION OF TIME TO FILE EXCEPTIONS AND RESPONSES MAY BE GRANTED BY THE CHIEF ADMINISTRATIVE HEARING OFFICER FOR GOOD CAUSE SHOWN OR IF ALL PARTIES ARE IN AGREEMENT. RESPONSES AND EXCEPTIONS SHOULD BE FILED WITH THE OFFICE OF ADMINISTRATIVE HEARINGS, 11 STATE HOUSE STATION, AUGUSTA, ME 04333-0011. COPIES OF WRITTEN RESPONSES AND EXCEPTIONS MUST BE PROVIDED TO ALL PARTIES. THE COMMISSIONER WILL MAKE THE FINAL DECISION IN THIS MATTE

cc: Lillian Phillips, DHHS, 442 Civic Center Drive, Augusta, 04330
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